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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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1998 Biennial Regulatory Review -)
Streamlined Contributor Reporting Requirements)
Associated with Administration of)
Telecommunications Relay Services, North)
American Numbering Plan, Local Number)
Portability, and Universal Service Support)
Mechanisms)

CC Docket No. 98-171

Comments of USF Coalition

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SUMMARY

Although this rulemaking is designed to *reduce* carriers' reporting requirements, it would actually *increase* substantially certain carriers' universal service obligations. The Commission has proposed eliminating duplicative reporting requirements by adopting a single worksheet to replace the forms currently filed for the Universal Service Fund, the Telecommunications Relay Fund, the North American Numbering Plan administration and long-term local number portability administration. USF Coalition certainly supports the stated goal of reducing regulatory burdens and consolidating duplicative reports. However, the instructions for the proposed worksheet actually contain significant modifications to the universal service support mechanisms.

The instructions for the proposed worksheet would expand substantially the category of "interstate carriers," increase significantly the required universal service contribution based on international revenues, and regulate Internet and IP telephony. The Commission failed to give interested parties adequate notice of the proposed changes to the universal service support mechanisms contained in the instructions for the proposed worksheet. Moreover, the proposed changes exceed the Commission's statutory authority, contradict earlier findings by the Commission in the universal service proceeding, and may substantially hinder competition. USF Coalition urges the Commission not to make these unlawful and potentially harmful changes to the universal service support mechanisms.

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Comments of USF Coalition

The USF Coalition^{1/}, by its undersigned counsel, respectfully submits the following comments in response to the Notice of Proposed Rulemaking ("*Notice*") issued by the Federal Communications Commission ("FCC" or "the Commission") in the above-captioned proceeding.^{2/}

I. Introduction

In this proceeding, the Commission seeks public comment on a proposal to streamline fee filing worksheets into one common worksheet. On its face, the proposal is laudable; on closer inspection, however, the proposed new worksheet instructions contain substantive changes that will increase significantly some carriers' universal service contribution requirements. This proposal

^{1/} The USF Coalition consists of entities with an interest in international telecommunications and/or IP Telephony issues. Members of the USF Coalition will likely be affected by one or more of the changes proposed by the Federal Communications Commission in this proceeding and discussed in this pleading.

^{2/} *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 98-171, released September 25, 1998.

violates the Administrative Procedure Act by failing to provide adequate notice to allow interested parties to comment meaningfully on the proposed changes. In addition, the proposed changes exceed the Commission's statutory authority under section 254 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act"), directly contradict earlier findings by the Commission in the universal service proceeding, and are contrary to the public interest.

II. Background

In this proceeding, the Commission suggests consolidating the collection of common carrier data on a single worksheet that would replace the existing worksheets, forms, or other methods of collecting data for the Universal Service Fund ("USF"), the Telecommunications Relay Services ("TRS") Fund, and the cost recovery mechanisms for the North American Numbering Plan ("NANP") and local number portability ("LNP") administrations. These forms currently contain similar (but not identical) information and must be filed at different times and intervals and at different locations. USF Coalition wishes to stress that it strongly supports the Commission's stated goals of reducing regulatory burdens and consolidating duplicative reports. The existing reporting requirements are indeed unnecessarily burdensome.

The *Notice* states that the Commission is merely seeking to streamline reporting requirements and that its proposals will not alter the *substance* of what carriers report. However, the instructions for the proposed Telecommunications Reporting Worksheet ("TRW") contain language that, if adopted, would change substantively the universal service contribution requirements, resulting in an increase in the number of carriers required to contribute to the USF and an increase in the amount carriers must contribute.

III. The Commission Provides Inadequate Notice That It Is Proposing Substantive Changes to the Universal Service Support Mechanisms

In the *Notice*, the Commission states that it is proposing only "limited changes" and does "not seek to revisit the substantive requirements of the four support and cost recovery mechanisms."^{3/} Among the "limited changes" explicitly proposed by the Commission are modifications to the revenue bases for contributions to the TRS Fund and NANP administration. The Commission discusses these changes extensively in the *Notice*.^{4/} The Commission does not, however, mention at any point in the body of the *Notice* any modifications to the USF support mechanisms; therefore, one could reasonably conclude that it intended to make no substantive changes to carriers' USF obligations. Nevertheless, the TRW instructions, if adopted, would expand substantially the number of carriers that would have to contribute to the USF and the amount of contribution that certain carriers must make. In particular, the instructions would expand the category of "interstate carriers,"^{5/} increase significantly the required contribution based on international revenues,^{6/} and regulate Internet and Internet protocol (IP) telephony.^{7/} These proposals constitute significant substantive changes to the universal service support mechanisms for which the Commission failed

^{3/} *Notice* at ¶¶ 3,4.

^{4/} *Id.* at ¶¶ 14, 33-47.

^{5/} *TRW Instructions* at 9, 20.

^{6/} *Id.* at 19.

^{7/} *Id.* at 22-23.

to provide adequate notice.^{8/} Therefore, the Commission should either withdraw these proposed changes or issue a further Notice of Proposed Rulemaking in this proceeding to fully identify and discuss the implications of the significant policy changes included in the proposed TRW instructions.

The *Notice* does not contain, as required by the Administrative Procedure Act, "either the terms or substance of the proposed rule or a description of the subjects and issues involved" regarding the proposed changes to the universal service support mechanisms, nor does the Commission adequately explain the proposed changes.^{9/} Agency notice must "describe the range of alternatives being considered with reasonable specificity; otherwise, interested parties will not know what to comment on, and notice will not lead to better informed agency decisionmaking."^{10/} The *Notice* fails to meet this standard. The body of the *Notice* does not even *mention* that the Commission is considering significant changes to carriers' universal service contribution obligations. Moreover, the *Notice* fails to discuss the issues raised by these proposed modifications. As a result,

^{8/} Although some of the proposed modifications were also set forth in the instructions for the Commission's Universal Service Worksheet (FCC Form 457), *e.g.*, expansion to include entities with affiliates providing interstate services, the Commission adopted the Worksheet without a notice and comment proceeding. *FCC Announces Release of Universal Service Worksheet, Form 457*, Public Notice, CC Docket Nos. 97-21, 96-45, released August 4, 1997; *see Universal Service Worksheet Instructions* at 4, 18. Because the Commission attempted a substantive modification of the rules without notice and comment, the language of the *Universal Service Order* is currently controlling. *See Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, released May 8, 1998, ¶ 779 ("*Universal Service Order*").

^{9/} 5 U.S.C. § 553(b)(3).

^{10/} *Small Refinery Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548 (D.C. Cir. 1983) (EPA notice that it might make unspecified changes in the definition of small refinery is too general to be adequate).

there is nothing on which interested parties can base their comments, depriving the agency of their expertise and ideas.^{11/} The proposed rulemaking therefore violates the Administrative Procedure Act.

IV. The Proposed Changes to the Universal Service Support Mechanisms Exceed the Commission's Statutory Authority, Contradict Earlier Findings by the Commission and May Have Harmful Anticompetitive Consequences

The proposed TRW instructions would expand substantially the category of "interstate carriers," increase significantly the required USF contribution based on international revenues, and regulate Internet and IP telephony. As explained below, these changes exceed the Commission's statutory authority and contradict earlier findings by the Commission in the universal service proceeding. In addition, these proposals will hinder competition by imposing burdensome regulatory obligations on carriers. USF Coalition urges the Commission not to adopt these unlawful and potentially harmful modifications to the universal service support mechanisms.

A. The Proposal Unlawfully Expands the Definition of "Interstate Carrier"

The proposed TRW instructions would unlawfully require USF contributions by certain entities that do not themselves provide any interstate telecommunications. The Commission has previously acknowledged that its statutory authority to impose USF contribution obligations is expressly limited to entities providing "interstate telecommunications."^{12/} Under the Act, every telecommunications carrier that provides *interstate* telecommunications services must contribute,

^{11/} *National Tour Brokers Ass'n v. U.S.*, 591 F.2d 896 (D.C. Cir. 1978) (The purpose of the notice requirement is to allow the agency to benefit from the expertise and ideas of interested parties and to ensure that the agency maintains a flexible and open-minded attitude toward its own rules.)

^{12/} *Universal Service Order*, ¶ 779

on an equitable and nondiscriminatory basis, to universal service support.^{13/} In its *Report to Congress*, the Commission stated that "the statute precludes it from assessing contributions on the revenues of purely international carriers providing service in the United States." Recognizing the bounds of its statutory authority, the Commission sought a legislative change that would "allow it to reach the international revenues of all carriers providing service in the United States."^{14/} Congress has not legislated such a change.

Based on this statutory limitation, the Commission specifically excluded international-only carriers from USF contributions. The Commission found that "carriers that provide only international telecommunications services are not required to contribute to universal service support mechanisms because they are not 'telecommunications carriers that provide interstate telecommunications services.'"^{15/} Accordingly, the Commission's current USF rules exempt international-only

^{13/} 47 U.S.C. § 254(d). The Act defines interstate communication as:

[C]ommunication or transmission (A) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (B) from or to the United States or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act (other than section 223 thereof), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place thereof, if a such communication is regulated by a state commission.

47 U.S.C. § 153(22). The Commission may also impose contribution obligations (and has done so) on "[a]ny other provider of *interstate* telecommunications." 47 U.S.C. § 254(d) (emphasis added).

^{14/} *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, released April 10, 1998, ¶ 113 ("*Report to Congress*").

^{15/} *Universal Service Order*, ¶ 779.

service providers from universal service contribution, but subject the international revenues of "interstate" service providers to assessment.^{16/}

The proposed TRW instructions would unlawfully expand the definition of "interstate service provider." These instructions state that an entity provides interstate services "if it or any affiliate" provides interstate services.^{17/} This proposal substantively changes the universal service obligations for a significant number of carriers. Section 254(d) authorizes the Commission to require contributions only from providers of interstate telecommunications, not from their affiliates. Where Congress wanted to take the activities of affiliates into account, it has stated so quite clearly. For example, under section 260(b) of the Act, within sixty days of receipt of a complaint concerning telemessaging, the Commission shall "order the local exchange carrier *and any affiliates* to cease engaging in such violation."^{18/} Section 271(a) provides that "neither a Bell operating company, *nor any affiliate* of a Bell operating company, may provide interLATA services except as provided within this section."^{19/} Section 254(d) contains no similar language authorizing the Commission to

^{16/} 47 U.S.C. § 254(d); 47 C.F.R. § 54.703.

^{17/} *TRW Instructions* at 9, 20. An affiliate is a "person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person." *Id.* at 16 (citing 47 U.S.C. § 153(1)).

^{18/} 47 U.S.C. § 260(b) (emphasis added).

^{19/} 47 U.S.C. § 271(a) (emphasis added). Both the statute and the Commission itself have recognized the distinction between carriers and their affiliates in many other contexts. *See, e.g.*, 47 U.S.C. § 228(c)(8)(D)(ii) (written agreement not required "for directory services provided by a local exchange carrier or its affiliate"); 47 U.S.C. 251(c)(2)(C) (ILEC has duty to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection"); 47 U.S.C. § 274(a) ("No Bell operating company or any affiliate may engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its

impose contribution obligations on affiliates of interstate carriers or of other interstate telecommunications providers.

Because it directly contradicts the plain language of the Act, Congressional intent, and the Commission's *Universal Service Order*, the Commission should remove the affiliate language from the proposed TRW instructions.

B. The Commission Should Not Require Contribution Based on Foreign-Billed Revenues

If an international service provider also provides interstate telecommunications, current Commission rules require contribution for international services based only on international revenues obtained from users located within the United States.^{20/} The *Universal Service Order* further indicates that non-exempt international carriers must contribute based on U.S. billed revenues only.^{21/} However, according to the proposed TRW instructions, the Commission would require contribution broadly based on revenues "billed by U.S. contributors" for "traffic [other than settlement receipts] that must be reported on . . . international traffic data and circuit reports."^{22/}

affiliates' basic telephone service"); 47 U.S.C. § 275(a) ("No Bell operating company or affiliate thereof shall engage in the provision of alarm monitoring services before the date which is five years after the date of enactment of the Telecommunications Act of 1996"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147, released August 7, 1998, ¶¶ 83 (affiliate is not "deemed an incumbent LEC and therefore would not be subject to incumbent LEC regulation").

^{20/} Non-exempt international service providers are required to contribute to the USF based only on "international revenues derived from *domestic* end users for telecommunications or telecommunications services." 47 C.F.R. § 54.709(a)(1) (emphasis added).

^{21/} *Universal Service Order*, footnote 2113.

^{22/} *TRW Instructions* at 19.

Since no explanation accompanies the proposed instructions, it is unclear whether carriers will continue to be allowed to exclude revenues derived from services billed to foreign customers or whether carriers may have to contribute based on revenues (other than settlement receipts) from both U.S.-billed traffic and foreign-billed traffic. Absent clarification from the Commission, therefore, a universal service contributor—currently allowed to exclude foreign-billed revenues from its contribution base under Commission rules—may now have to contribute based on such foreign-billed revenues.

The Commission has not stated an intention to depart from its current policy and has not proposed to amend § 54.709(a)(1) which limits contribution obligations to U.S.-billed revenues. USF Coalition therefore assumes that the language in the instructions for the proposed TRW refers only to domestic-billed revenues of carriers providing international telecommunications services. USF Coalition urges the Commission to clarify that the language in the instructions, in keeping with its rules, refers only to international revenues derived from domestic end-users.

The imposition of contribution obligations on foreign-billed revenues would not only directly contradict current Commission rules, but would also put non-exempt international service providers at a distinct competitive disadvantage compared with their international-only or foreign competitors. The Commission's fundamental international telecommunications policy objective is to promote competition worldwide so as to ensure that the public receives high-quality telecommunications services at reasonable prices. To help achieve this policy objective, the Commission has supported and encouraged international call-back services.^{23/} Encouraging call-back services is a vital means

^{23/} *VIA USA Ltd.*, 9 FCC Rcd 2288 (1994), *aff'd on recon.*, 10 FCC Rcd 9590 (1995).

to encourage competition in foreign markets that have not liberalized to permit U.S. companies to provide services within their market. Call-back effectively creates competitive choices in a foreign country through the use of an U.S.-originated service. When a caller in a foreign country has a call-back option, that person has the opportunity to exercise commercial choices and select the product that best fits its needs in terms of price, service, quality and other concerns. Because these services can offer an alternative to the services provided in the foreign country, the Commission should not discourage U.S.-based carriers from offering call-back services. Such carriers are already at a competitive disadvantage because the Commission does not require their foreign-based competitors to contribute to universal service support even on their U.S.-billed traffic. To include foreign-billed revenues of non-exempt international service providers would compound the damage and imperil the ability of such entities to provide competitive service.

In addition, U.S. carriers are beginning to provide end-to-end services in other countries. The Commission's jurisdiction over services provided by U.S.-based carriers in foreign countries is doubtful, at best. A U.S. company that offers service abroad and receives revenues abroad should understand what its USF contributions are. USF Coalition members are unable to determine their USF contributions according to the proposed instructions. Moreover, U.S. international service providers may additionally be subject to universal service contributions or other tax obligations abroad, and should not be subjected to imposition of double burdens. In any event, foreign-billed revenues should not be subject to contribution because it contradicts Commission policy of promoting worldwide competition by encouraging U.S. carriers to provide services abroad.

C. The Commission Must Provide Parties Notice and Opportunity to Establish a Record to Support any Regulatory Classifications of Internet and IP Telephony

According to the instructions for the proposed TRW, the Commission would require carriers to make universal service contributions based on revenue from "calls handled using internet technology as well as calls handled using more traditional switched circuit techniques."^{24/} If the Commission adopts the proposed instructions, it will have decided not only to subject Internet and IP telephony providers to universal service contributions and other fees for the first time, but also to resolve the controversial issue of how to regulate Internet and IP telephony without adequate public notice. USF Coalition strongly recommends that the Commission examine the relevant issues more thoroughly before determining that revenues from Internet and IP telephony be subject to universal service and other contribution requirements.

The Commission to date has not formally considered the legal status of Internet and IP telephony. The Commission has stated that phone-to-phone IP telephony "bear[s] the characteristics of telecommunications services," but repeatedly stressed in the *Report to Congress* that making any definitive pronouncements without a more comprehensive record focused on individual service offerings would be inappropriate.^{25/} Internet-based services are in their infancy, and the Commission will stunt their growth and stifle innovation by imposing burdensome regulatory obligations on such services at this time.^{26/}

^{24/} TRW Instructions at 23.

^{25/} Report to Congress, ¶¶ 3, 14, 55, 83, 90, 105.

^{26/} Similarly, the Commission maintained the existing price structure for ISP services to "[avoid] disrupting the still-evolving information services industry and [advance] the goals of the 1996 Act to 'preserve the vibrant and competitive free market that presently exists for the Internet

The Commission may only assess universal service contributions on revenues from "telecommunications," which currently does not include Internet and IP telephony.^{27/} Thus, to adopt the proposed TRW instructions and require contributions based on revenues from Internet and IP telephony, the Commission would first have to decide to regulate Internet and IP telephony as telecommunications. The classification of Internet-based services raises many complicated and overlapping issues, with implications far beyond universal service.^{28/} For example, incumbent local exchange carriers ("ILECs"), to avoid their reciprocal compensation obligations, have argued that calls to Internet service providers ("ISPs") are not local calls. If ILECs are making claims that such traditionally local calls are interstate, could similar claims be made that these calls are therefore subject to "interstate" USF contribution rates? This example shows the potential for confusion and the wide-ranging consequences of the Commission's proposal to regulate calls made using Internet technology. To avoid such potentially harmful consequences, the Commission should not adopt the proposal to include revenues from toll calls handled using Internet technology in the revenues subject to assessment.

The Commission will only create more confusion by using, without definition, a phrase as vague as "internet technology" in its TRW instructions. Parties differ as to what constitutes Internet and IP telephony. AT&T recently defined phone-to-phone IP telephony as offering "customers dial-

and other interactive computer services, unfettered by State or Federal Regulation.'" *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, First Report and Order, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, released May 16, 1997, ¶ 344 (quoting 47 U.S.C. § 230(b)(2)).

^{27/} 47 U.S.C. § 254(d).

^{28/} *Universal Service Order*, ¶ 790.

up access using traditional handsets to long distance services via private or public internet backbone facilities" and lists Qwest, IDT, ICG and AT&T as companies providing such services.^{29/} However, within the same proceeding, Level 3 Communications, Inc., an IP telephony provider, states:

Although often confused and/or used interchangeably, Internet telephony and IP telephony are two different things altogether. The former is the presently available, somewhat rickety blend of traditional circuit switched and packet switched services; it is Internet based, and while growing rapidly, is most suitable for casual or everyday applications. The latter is transmitted based on a packet switching protocol and may be offered over facilities completely unrelated to the Internet.^{30/}

These differing definitions further demonstrate the complexity of the issues surrounding regulation of Internet-based services. Rather than hastily deciding the regulatory status of Internet and IP telephony in a single phrase in the instructions for the TRW, USF Coalition urges the Commission to postpone deciding such issues until it has the opportunity to more thoroughly assess the merits of regulating IP telephony and other Internet-based services.

V. Conclusion

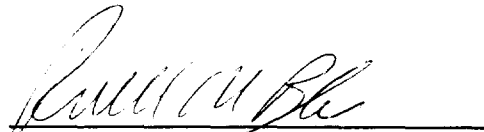
A rulemaking designed to reduce carriers' reporting requirements should not be a vehicle to alter substantively the universal service support mechanisms. Although the Commission intended to propose only "limited changes" in this proceeding, the instructions for the proposed TRW contain several substantive changes that would increase substantially certain carriers'

^{29/} Reply Comments of AT&T Corp., *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, filed October 16, 1998.

^{30/} Reply Comments of Level 3 Communications, Inc., *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, filed October 16, 1998.

universal service contributions. These proposals exceed the Commission's statutory authority, contradict earlier Commission findings in the universal service proceeding, and may significantly hinder the provision of competitive services. For the reasons stated above, USF Coalition urges the Commission to decline to adopt these proposals.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Russell M. Blau", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Barbara Miles, hereby certify that I have on this 30th day of October, 1998, served copies of the foregoing comments of USF Coalition on the following via hand delivery:

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